University Committee on Privilege & Tenure

Meeting

December 5, 2011

MINUTES

Present: David Brundage, chair; Andrew Guzman, Berkeley; Philip Kass, Davis; Tony Reese, Irvine (by phone); Bob Hillman, Davis for Merced; Francesco Chiapelli, Los Angeles (alternate); Victor Lippit, Riverside; Duncan Agnew, San Diego; Jeffry Lansman, San Francisco; Sarah Fenstermaker, Santa Barbara (by phone); Onuttom Narayan, Santa Cruz (by phone); Martha Winnacker, Senate Executive Director, staff; Cynthia Vroom, Office of General Counsel, consultant.

I. Greetings, Introductions & Announcements. The Chair opened the meeting by noting that UCP&T has not met for several years and is being revitalized. He stated that he intends for the committee to meet quarterly, by teleconference or in person as resources permit and matters for discussion require.

II. **Approval of the Agenda.** The agenda was approved as noticed.

III. Consent Calendar. The consent calendar was approved.

IV. **Review of Divisional experience with P&T processes & potential interaction with UCP&T.** Members reported on recent Privilege and Tenure activity on their respective campuses, noting that their committees have received few grievance claims. Three members described complex discipline cases involving conflict of commitment, outside compensation, teaching quality, handling of extramural funds, sexual harassment. Collateral issues included failed settlement efforts, unrealistic expectations by accused faculty, excessive delays and committee turnover between the filing of charges and the hearing or formal mediation, sometimes due to extended efforts to reach a settlement. Serious cases consume large amounts of committee and administration time as well as attorney fees for the University. On some campuses, administrations are proactively seeking out faculty violations of the Code of Conduct rather than waiting for complaints. Members found exchange of experiences to be useful.

V. **Faculty Code of Conduct & Senate Bylaws.** (A) The committee considered whether to recommend a Bylaw amendment based on the following issues: Does APM 015.III.A.3 and Senate Bylaw 335.B.6 provision that “no disciplinary action may commence if more than three years have passed” since the Chancellor or designee knew or should have known of the offense create an unreasonably short timeline for bringing charges? How should it apply to evidence of repeated similar misconduct? Should it apply equally to allegations of sexual harassment? Members discussed the intent of the limit to prevent cases being brought on the basis of “stale

memories” that are difficult to document for both the administration and the accused faculty member; however, in some cases perceived bad conduct, especially bullying and harassment, persists for years while administrators use informal rebuke and threats rather than initiating formal disciplinary proceedings in which evidence is carefully weighed. Some members suggested that the time limit should encourage administrators to begin disciplinary proceedings when they become aware of harassment rather than allowing the conduct to continue or escalate. Members considered the difficulty of defining “repetition” when current harassment charges also include retrospective allegations, with particular concern that harassment may take many forms that may be difficult to categorize as the same repetitive conduct. One member suggested that a longer time to bring charges is needed in research misconduct cases when external agencies conduct investigations; other members suggested that the campus investigation could proceed simultaneously. A member asked whether the time limit should apply when a victim, especially of sexual harassment, complained to an administrator at the time but was advised to withdraw the complaint. Members agreed that such an administrator would be culpable but did not reach a conclusion how such culpability should affect the faculty member's right to have a limit set on the period in which charges for a specific action might be brought. Campuses have interpreted the applicability of the time limit to old evidence of similar conduct in different ways and have prepared confidential memos that might contribute to the committee’s deliberations if they can be made available in redacted form. Senior Counsel Vroom will determine whether redacted memos can be shared without breaching confidentiality.
Action: The committee agreed to continue deliberating on the appropriateness of the time limit at its next meeting.

(B) The committee considered whether, if it proposed an amendment to Bylaw 336 it should also proposed an amendment to Bylaw 335: Is the three-year time limit for bringing grievances too short? Does Bylaw 335 adequately distinguish between grievances that cannot be remedied by a Chancellor?
After a brief discussion, members agreed that the existing symmetry between the time limit for bringing charges and lodging grievances is appropriate and determined that there was no viable way to define what actions that affect all faculty violate their individual rights. A member suggested that such grievances are more appropriate for collective bargaining.
Action: The committee agreed not to proceed with this inquiry.

(C) The committee considered whether experience in the divisions points toward revision of the APM: Are the disciplinary sanctions listed in APM 015 and 016 appropriately ranked as to severity? Is informal resolution being used to persuade accused faculty to accept sanctions without fully understanding their implications or how they might benefit from demanding more formal proceedings?
Severity of sanctions: Members discussed whether demotion, which creates a permanent record in a personnel file, should be considered a more severe sanction than suspension, which may be a temporary hardship but may not be visible in future CAP merit reviews. Members also reviewed the language of APM 016.II.3, which specifies that demotion should be used in a manner "consistent with the merit-based system for academic advancement" and is "appropriate" when the "alleged misconduct is relevant to the academic advancement process of the faculty member" and considered whether there evidence that this sanction is being misused in informal proceedings. [Note: APM 016.II.3 grants the Chancellor the non-delegable authority to impose

reduction in rank on a non-tenured member of the faculty but requires the President to approve reduction in rank of a tenured member of the faculty; the Chancellor has the authority to impose reduction of steps within a rank for all faculty.]

Members reported that divisional committees are not informed of sanctions agreed on by negotiation prior to the filing of formal disciplinary charges; some members noted that the APM expressly provides that listed disciplinary sanctions "for professional misconduct" shall not be imposed "until after the faculty member has had an opportunity for a hearing before the Divisional Committee on Privilege and Tenure , subsequent to a filing of a charge by the appropriate administrative officer . . ." However, APM 015.III.B.6 recommends that divisional disciplinary procedures include "provision for informal settlement of allegations of faculty misconduct before formal disciplinary proceedings are instituted." Anecdotal reports indicate that, administrators may offer the equivalent of plea deals in the form of acceptance of a "lesser" sanction as an alternative to filing formal charges with severe recommended sanctions and that, especially for junior faculty, the accused may not be aware of his or her rights when agreeing to such settlements. Privilege and tenure counselors for would-be grievants were proposed as a model for similar counseling that might be offered to faculty who face potential disciplinary charges, but members pointed to the limitation that grievance counselors advise only on available procedures and not on the merits of a proposed grievance claim and that such a model might not be appropriate for counseling an accused. Another possibility is to involve a faculty ombudsperson. Further discussion revealed that most P&T committees are not informed of informal negotiations that occur prior to or outside of the formal process and do not have any means of obtaining this information.

Action: (1) Members agreed to continue this discussion at the committee's next meeting with particular attention to how to ensure that faculty are able to make informed choices when they are involved in discussions of alleged misconduct without formal charges being filed; (2) Chair Brundage will propose language for consideration at the next meeting that would bind demotion to cases in which a prior promotion was directly related to the alleged misconduct; (3) Members agreed the committee should advocate for/recommend that administrators be required to advise all faculty of their rights under APM 336 and APM 015 and 016 when initiating discussions to resolve cases of alleged misconduct.

(C) The committee considered whether to propose an amendment to Bylaw 337 to clarify that it does not apply to early termination as a result of disciplinary action.

After a brief discussion, the committee voted unanimously to propose an amendment to Bylaw 337.

Action: UCP&T recommends that Bylaw 337 be amended by adding a sentence to Bylaw 337.A as indicated by the underlined text:

> In cases of proposed termination of a Senate or non-Senate faculty member before the expiration of the faculty member's appointment, or in cases where a tenured faculty member faces termination for incompetent performance, or for other faculty members whose right to a hearing before a Senate committee is given by Section 103.9 or 103.10 of the Standing Orders of The Regents (Appendix I) (hereafter collectively referred to as early termination), the faculty member may request a hearing before a Divisional Privilege and Tenure Committee. The committee shall then conduct a hearing on the case to determine whether, in its judgment, the proposed early termination is for good cause

and has been recommended in accordance with a procedure that does not violate the privileges of the faculty member. Resolution of the dispute, either through negotiation or mediation, is permissible and appropriate at any stage of these proceedings. Termination as a result of a disciplinary case pursuant to Bylaw 336 is not covered by this Bylaw.

No Senate or non-Senate faculty member may be terminated prior to the expiration of an appointment without having an opportunity for a hearing before the Divisional Privilege and Tenure Committee. So long as the faculty member requests a hearing before the end of his or her appointment, the Divisional Privilege and Tenure Committee shall appoint a Hearing Committee and proceed according to Section B below. If the faculty member fails to request a hearing before the end date of the appointment in question, the faculty member may seek a grievance hearing by grieving the non-reappointment pursuant to Senate Bylaw 335 in the case of Senate faculty or the Academic Personnel Manual in the case of non-Senate faculty.

VI. The Office of General Counsel and Discipline Cases. Senior Counsel Vroom described her role as the Office of General Counsel's designated legal adviser to committees on privilege in tenure. Provision of this resource grew out of perception in the 1990s and early 2000s that the increasing presence of lawyers representing administrators and accused faculty in privilege and tenure hearings created situations in which hearing committees could be overwhelmed by legal procedures. The OGC attorney adviser to the committee advises on procedure and the risks inherent in adopting various procedural rules. Although the parties' attorneys behave as if they were in court, privilege and tenure hearings are not governed by the formal rules of evidence; for example, hearsay evidence is admitted and the committee must determine what weight to give such evidence. She advises committees to be fair above all, not to be intimidated by aggressive lawyering, and to use common sense in pursuing this goal. She is not able to offer advice on issues of jurisdiction and cannot take sides when one party is behaving badly, although she can and does admonish all parties impartially. The attorney has no contact with the attorney from OGC who represents the administration, a firewall that is rigorously maintained and that is widely implemented in large law firms. She will contact an attorney for either party only if requested to do so by the committee.

Q: Committees have received complaints from campus employees that the administration's attorney was questioning them as witnesses prior to the hearing and have been concerned that witnesses may be intimidated or their testimony biased as a result of such questioning. What is appropriate?

A: There is no prohibition on pre-hearing questioning of witnesses, but badgering is inappropriate. Senior Counsel Vroom will consider how to advise committees whether they should notify potential witnesses that they may be contacted by attorneys, that they have a right not to respond, that they should not be subjected to badgering, and that they may not be retaliated against for any testimony they do or do not give.

Q: Is training available to help committees understand the law and the differences between procedures for handling grievances and charges?

A: Senior Counsel Vroom is available to offer such training but needs to be asked; she cannot initiate a training proposal. Chairs of hearing committees need to understand that they have the final authority to resolve any dispute between lawyers and that they may overrule or prohibit objections.

Q: To what extent could procedural missteps by a hearing committee cause a court in a subsequent legal action to overturn its ruling?

A: Committees have great discretion, and courts will defer to internal procedures; but the proceedings must be fair; conclusions must be solidly and thoughtfully based on the evidence presented. It is

extremely unlikely that the outcome of a fair proceeding will be overturned.

VII. Executive Session. For reasons of time and because the proposed topics had been covered, there was no executive session.

VIII. Consultation with Senate Leadership. Council Chair Bob Anderson provided an overview of general privilege and tenure issues that he anticipates could arise in the current year: (1) possible grievances arising from the requirement that all University sign an amended acknowledgment of the University's patent policy; (2) possible grievances that may arise from police actions against protesters, some of whom are reportedly members of the faculty; (3) other grievance issues that may arise in the context of amendments to APM 010 to protect faculty speech on issues of University governance after the United States Supreme Court's decision in *Garcetti*; and (4) concern that some legal opinions issued by OGC may not be the only valid interpretation of the laws in question. I

IX. Administrative sanctions for failure to comply with University policy. Members discussed whether to respond to the Provost's informal request that the Senate recommend specific administrative sanctions as a consequence for failure or refusal to comply with University policies, such as the requirement that all employees sign the revised patent acknowledgment. Members discussed what should define the distinction between "administrative sanctions" and "faculty discipline." Rather than dividing the two forms of action on the basis of their relative severity, consensus emerged that administrative sanctions should be structured as logical consequences of specified actions that apply equally across all classes of University employee and are not associated with distinctive faculty roles; administrative sanctions should not be viewed or handled as punishment. For example, sexual harassment prevention training is required by law for all supervisors; stripping a faculty member of supervisory responsibility is a logical consequence of the individual's failure to complete the training; the only grounds for grievance would be a factual dispute over whether the individual had taken the training. However, the requirement to sign the new patent acknowledgment is University policy and not an external mandate; one potential logical consequence of failing to sign the revised document would be inability to apply for external research funds. However, some sanctions could be interpreted as violations of faculty rights and privileges. It is not possible to anticipate all circumstances in which the requirement or a sanction for failing to comply with it might be grievable.
Action: The committee agreed by consensus to decline to recommend specific sanctions and to make a statement that states that privilege and tenure committees will consider grievance claims resulting from the patent process. [Note: This letter was sent to Council Chair Anderson on December 21.]

X. Review divisional data reports. Members agreed that the aggregated data on privilege and tenure activity is useful. However, they noted inconsistencies between the number of reported formal proceedings and their perceptions that the number of grievance cases is increasing. A member reported that at his campus an administrator is proactively seeking out cases in which there may be appearances of faculty conflicts of commitment, with the result that unfounded charges may be brought.

XI. Role of charges committee. Members compared notes on how charges are handled at their campuses. Charges committees are constituted separately from Privilege and Tenure committees at Riverside, Los Angeles, and Santa Cruz. On other campuses,the charges committee is a subcommittee of the Committee on Privilege and Tenure. Members discussed how these subcommittees function in relation to the full Committee. Enough differences were identified to suggest that a survey of practices would be useful, especially in regard to how probable cause is determined. Members reported that administrators

frequently offer settlements when they are notified that a grievance has been filed.

XII. UCP&T as a resource to divisional committees on privilege and tenure. Members agreed that the discussion at this meeting had been a resource and that UCP&T should serve as clearing house for different campus practices.

Action: Members agreed that the next meeting should devote significant time to discussion of (1) redacted information about the kinds of cases they are receiving; and (2) examination of practices on the campuses.
Action: Members agreed to request that Senior Counsel Vroom provide training. More discussion is needed to determine the structure, participants, location(s), and scope of such training.